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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-636

FRANK W. COKER and REGINA COKER

Petitioners,

— against —

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

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Attorney for Petitioners

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PETITION FOR REHEARING

To the Honorable Justices of the Supreme Court of the United States:

Petitioners Frank W. Coker and Regina Coker present this petition for a rehearing in the above entitled case and, in support thereof, respectfully show the following.

The Court's Action Herein

On January 7, 1974 this Court denied the petition for a writ of certiorari in the above-entitled case.

Reasons for Granting a Rehearing

The rehearing petitioned for should be granted for the following reasons:

This Court's Recent Decision in Fausner Is Under Attack on Every Front.

On January 10, 1974 the Court of Appeals for the Second Circuit affirmed without opinion a Tax Court decision in *DeMichele* v. *Commissioner of Internal Revenue* that 71% of DeMichele's commuting expenses are deductible and 29% not deductible. The Tax Court opinion is reported at T.C. Memo 1973-115; Para. 73, 115 P-H Memo T.C. The Second Circuit Docket No. is 73-2299.

Upon the DeMichele oral argument, the Second Circuit judges specifically inquired about the Supreme Court actions in both *Fausner* v. *Commissioner,* 41 U.S.L.W. 3670 (Sup. Ct., June 25, 1973) and this instant *Coker* case. The Second Circuit judges were informed of the recent denial of the instant *Coker* petition for certiorari. During the discussion of this *Coker* case it was suggested that a petition for rehearing be filed with the Supreme Court to request the Supreme Court to hear the case and issue guidance on the constitutional questions presented by Coker.

During an exhaustive discussion of the *Fausner* case at the Second Circuit the uncontroverted analysis of the *Fausner* case was that the Supreme Court was misled as to the facts in *Fausner*. The Supreme Court was handed an impossible set of facts to work with. The Supreme Court was told that it was a necessity for Fausner to transport 2 bags (a forty pound flight-kit bag and a twenty

pound overnight bag) when driving to and from each flight assignment. The Supreme Court was also told that Fausner would have driven to work even if it had not been necessary to transport the 2 bags.

The problem with these Fausner "facts" is that they cannot co-exist. They are mutually exclusive and irreconcilable. "Necessity" of transporting Fausner's 2 bags cannot simultaneously exist with "non-necessity" of transporting Fausner's 2 bags. If in fact it was necessary for Fausner to transport the 2 bags in order to perform his duties on a flight assignment, it has to be clear to all rational persons that he would not go to work without the bags for the simple reason that he could not perform his duties on the flight assignment without his flight kit and/or other bag. If, on the other hand, he could have performed his flight assignment duties without the bags, that would merely show that the bags were not necessary to perform his duties. Take your pick. Fausner's claimed transportation expenses were either necessary or unnecessary—but they cannot fall simultaneously into both the necessary and unnecessary categories.

Fausner was a *pro-se* Tax Court case and Fausner established the law-of-the-case as it affected him by agreeing that, as to his case, commuting expenses are nondeductible under Section 262 of the Internal Revenue Code as personal expenses. Fausner then attempted to avoid his own law-of-the-case on the theory that his automobile expenses were incurred to transport his flight bag and overnight bag—as distinguished from transporting himself. This conflicting set of "facts" and law-of-the-case was then presented to the Supreme Court on behalf of Fausner for solution. The Supreme Court took the case *without briefs or oral argument* and determined there was no solution to the submitted "facts" and law-of-the-case.

The *Fausner* case now also has the judges of the United States Court of Appeals for the Second Circuit confused to the point where the Second Circuit judges cannot write an opinion on a simple case involving ordinary commuting expenses. The Commissioner is confused because he claims 71% of DeMichele's commuting expenses are deductible and that "a portion" (29%) is nondeductible.

The DeMichele oral argument was most detailed and exhaustive. It was there also shown, backed up by detailed analysis on brief, and *uncontroverted by the Commissioner in any fashion* that

1. There is no Treasury Regulation whatsoever that says commuting expenses claimed under Section 162(a) of the Internal Revenue Code are not deductible.

2. Section 262 is unconstitutionally vague and indefinite.

3. There is no Internal Revenue Code provision that says the expenses of going to and from work are not deductible and *neither does Congress have the authority under the Constitution to enact such a statute.*

The Solicitor General Has Misled This Court.

The Solicitor General in his Memorandum For The Respondent In Opposition on this *Coker* petition for a writ of certiorari has misled this Court in a number of instances.

On pages 1 and 2 of his Memorandum, the Solicitor General misled this Court by indicating that Coker was relying principally on the fact that Coker transported tools to and from work. This of course is just not true.

Coker is relying on the uncontroverted facts that all his expenses of driving to, from and on the job were necessarily incurred in earning $11,291.35 in 1966. Coker would not have driven his automobile to work without his carpenter tools or his automobile because the tools *and* the automobile were the implements physically required to be at the job site in order for Coker to perform his work. Coker is not Fausner. Coker will not enter into a collusive agreement with the Solicitor General to inflict a fraudulent set of facts upon this Court. Coker is quite happy with the evidence in this case. Neither has the Solicitor General explained how it could even be theoretically possible that Coker could be required to bring his automobile to work to perform his duties and simultaneously *not* be required to bring his automobile to work to perform his duties. The Solicitor General is selling confusion. Coker is propounding the Constitution and United States statutes.

Coker is not trying to avoid any commuting rule. Coker, in fact, has shown in the Courts below that *there is no commuting rule under our statutes and constitution.* Our research and analysis is so complete that the Commissioner is unable to answer it on brief and the Courts below are unable to write opinions showing any error whatsoever in any part of our research and argument.

Because our research is so complete we are able to report that the Solicitor General misled this Court on page 4 of his Memorandum, fn. 3 by not informing this Court that his cited "S. 1048, 1 Cum. Bull. 101" was declared obsolete in Rev. Rul. 69-31, Cum. Bull. 1969-1, pg. 307. Neither did he inform this Court that the obsolete "S. 1048" was built on the foundation of a Victorian

statute (Act 16 and 17 Victoria, c. 34) and was not based on American Statutory or constitutional law. The so-called "commuting rule" is BRITISH. It is not AMERICAN.

We have previously pointed out that none of the treasury regulations cited by the Solicitor General in his fn. 3 says that commuting expenses claimed under Section 162(a) of the Internal Revenue Code are not deductible.

So also the Solicitor General misled this Court in his fn. 3 by failing to inform this Court that *Sullivan* v. *Commissioner,* 1 B.T.A. 93 was a 1924 decision by the Board of Tax Appeals, which decision was not final under the Revenue Act of 1924 (43 Stat. 253, 336) which created the Board; neither was this 1924 *Sullivan* executive decision appealable to the Courts. It was not until enactment of the Revenue Act of 1926 that decisions of the Board became appealable to the Courts and final unless appealed (44 Stat. 9, 109). This 1924 *Sullivan* executive decision was also built on the foundation of the same Victorian statute (Act 16 and 17 Victoria, c. 34), as is obvious by reading the British cases cited therein.*

It is Imperative that the Court Grant the Prayed-For Writ of Certiorari

The question presented in this case must be clarified. Everything is now in complete disarray because of what Fausner and the Solicitor General did to this Court. The

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* We are informed by the librarians of the Supreme Court that the British cases cited in the 1924 *Sullivan* decision are not owned by or in the Supreme Court library. Neither does the Second Circuit Court of Appeals library have any of the British or Scottish cases cited on page 5 of the instant petition for a writ of certiorari. Inasmuch as these cases must be read for a full understanding of the errors in this case, it may facilitate matters if the librarian were requested to obtain them for the Court.

Fausner decision has all of the Tax Court judges and Treasury trial lawyers confused and stymied. Now it is certified that the Second Circuit Court of Appeals judges cannot understand and live with the Fausner decision.

The undersigned attorney has done more research in this area of law than any other attorney in this nation in this century.

Upon certiorari being granted, the undersigned attorney will present on brief a comprehensive survey and analysis of this entire area of law so as to permit this Court to write a complete and definitive opinion on this subject and case.

CONCLUSION

The petition for rehearing, as well as the petition for a writ of certiorari, should be granted and the case set for oral argument.

Respectfully submitted,

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159 Princeton Road
Rockville Centre, N.Y. 11570
Attorney for Petitioners

January, 1974.

Certificate of Counsel

I, THOMAS J. CARLEY, attorney for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds above specified.

THOMAS J. CARLEY
Attorney for Petitioners